

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6118

To be argued by
GARY G. COOPER

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-6118

LOUIS C. OSTRER, RITA OSTRER, JACK OSTRER
and DINA GELMAN,

Plaintiffs-Appellants,

—against—

WILLIAM H. ARONWALD, ROBERT B. FISKE, JR.,
ALAN NAFTALIS, MARVIN SONTAG, JAMES
KILLEEN, EDWARD H. LEVI, and UNITED
STATES OF AMERICA,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Issues Presented	2
Statement of the Case	2
Statement of Facts	5
A. Proceedings Below	5
B. The Complaint	6
C. The Affidavits	10
1. The Ostrer Affidavit	10
2. The Attorneys' Affidavits	15
3. The Defendants' Affidavits	15
POINT I—The Vague And Conclusory Allegations Contained In The Third Cause Of Action Do Not State A Claim For Which Relief Can Be Granted	18
A. Plaintiffs Fail To Satisfy Pleading Require- ment	19
B. The Cases Relied On By Plaintiffs Are In- apposite	26
C. Defendants Do Not Admit The Allegations In The Complaint	28
POINT II—The District Court Correctly Concluded That The Defendants Aronwald And Naftalis Were Immune From Suit	30
A. Prosecutorial Immunity Applies	30
B. Injunctive Relief Was Properly Denied ...	33

	PAGE
C. The Allegations In The Fourth Cause Of Action Do Not State A Claim	34
D. Cases Relied On By Plaintiffs Are Inapposite	37
POINT III—Killeen And Sontag Established Good Faith Defense	41
POINT IV—Plaintiffs Third And Fourth Causes Of Action Are Premature	43
CONCLUSION	46

TABLE OF CASES

<i>Adams v. Home Owners Loan Corp.</i> , 107 F.2d 139 (8th Cir. 1939)	41
<i>Austin v. Manlin</i> , 433 F. Supp. 684 (E.D. Pa. 1977)	38
<i>Application of Texas Co.</i> , 27 F. Supp. 847 (E.D. Ill. 1939)	34
<i>Barr v. Matteo</i> , 360 U.S. 564 (1959)	43
<i>Black v. United States</i> , 534 F.2d 524 (2d Cir. 1976) 19, 32, 39	
<i>Blackburn v. Fiske University</i> , 443 F.2d 121 (6th Cir. 1971)	29
<i>Blair v. United States</i> , 250 U.S. 278 (1919)	35
<i>Bradley v. Fisher</i> , 80 U.S. 335 (1871)	31
<i>Brawer v. Horowitz</i> , 535 F.2d 830 (3d Cir. 1976)	34
<i>Briggs v. Goodwin</i> , Dkt. No. 75-1642 (D.C. Cir., Sept. 21, 1977)	39, 40

	PAGE
<i>Brown v. General Services Administration</i> , 507 F.2d 1300 (2d Cir. 1974), <i>aff'd</i> , 425 U.S. 820 (1976)	3
<i>Build of Buffalo v. Sedita</i> , 441 F.2d 284 (2d Cir. 1971)	26
<i>Cawley v. Warren</i> , 216 F.2d 74 (7th Cir. 1956)	31
<i>Centracchio v. Garrity</i> , 198 F.2d 382 (1st Cir. 1952)	44
<i>Central Mexico Light & Power Co. v. Munch</i> , 116 F.2d 85 (2d Cir. 1940)	41
<i>Cohen v. Illinois Institute of Technology</i> , 524 F.2d 818 (7th Cir. 1975), <i>cert. denied</i> , 425 U.S. 943 (1976)	25
<i>Cole v. Cardoza</i> , 441 F.2d 1337 (6th Cir. 1971)	29
<i>Cooper Agency, Inc. v. McLeod</i> , 234 F. Supp. 276 (E.D.S.C. 1964), <i>aff'd</i> , 348 F.2d 919 (4th Cir. 1965)	29
<i>Costello v. United States</i> , 350 U.S. 359 (1956)	32, 36
<i>Cunningham v. Ward</i> , 546 F.2d 481 (2d Cir. 1976)	28
<i>Dunleavy v. Ternullo</i> , 410 F. Supp. 1166 (S.D.N.Y. 1976)	28
<i>Economou v. U.S. Department of Agriculture</i> , 535 F.2d 688 (2d Cir.), <i>cert. granted</i> , 45 U.S.L.W. 3554 (U.S. Feb. 22, 1977)	42
<i>Escalera v. New York City Housing Authority</i> , 425 F.2d 853 (2d Cir.), <i>cert. denied</i> , 400 U.S. 853 (1970)	27
<i>Exchange National Bank of Chicago v. Touche Ross Co.</i> , 544 F.2d 1126 (2d Cir. 1976)	41
<i>Fine v. City of New York</i> , 529 F.2d 70, 74 (2d Cir. 1975)	25

	PAGE
<i>Friedman v. Beame</i> , Dkt. No. 77-7095, slip op. 4845 (2d Cir., July 21, 1977)	41
<i>Garin v. United States</i> , 313 F.2d 641 (1st Cir. 1963)	37
<i>Gerstein v. Pugh</i> , 420 U.S. 103 (1975)	34
<i>Gregoire v. Biddle</i> , 177 F.2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950)	31
<i>Heese v. DeMatteis Development Corp.</i> , 417 F. Supp. 864 (S.D.N.Y. 1976)	28
<i>Helstoski v. Goldstein</i> , Dkt. No. 76-1956 (3d Cir., Feb. 22, 1977)	39
<i>Holmes v. New York Housing Authority</i> , 398 F.2d 262 (2d Cir. 1968)	27
<i>Imbler v. Pachtman</i> , 424 U.S. 409 (1976)	31, 32
<i>Inmates of Attica Correctional Facility v. Rockefeller</i> , 477 F.2d 377 (2d Cir. 1973)	32, 35
<i>In Re Grand Jury Subpoena Duces Tecum Addressed to Provision Salesman</i> , 203 F. Supp. 575 (S.D. N.Y. 1961)	46
<i>In Re Rappaport</i> , Dkt. No. 77-3013, slip op. 4181 (2d Cir., June 14, 1977)	30
<i>J. P. Foley & Co. v. Vanderbilt</i> , 523 F.2d 1357 (2d Cir. 1975)	30
<i>Jacobson v. Organized Crime & Racketeering Sec- tion</i> , 544 F.2d 637 (2d Cir. 1976), cert. denied, 45 U.S.L.W. 3666 (U.S. Apr. 5, 1977)	21, 23, 24, 25
<i>Kadar Corp. v. Milbury</i> , 549 F.2d 230 (1st Cir. 1977)	25
<i>Kauffman v. Moss</i> , 420 F.2d 1270 (3d Cir.), cert. denied, 400 U.S. 846 (1970)	25
<i>Koch v. ...</i> , 533 F.2d 80 (2d Cir. 1976)	19, 25
<i>M. ... Merola</i> , 532 F.2d 191 (2d Cir. 1976) .	21, 25, 44

	PAGE
<i>Morpurgo v. Board of Education</i> , 423 F. Supp. 704 (S.D.N.Y. 1976)	20, 25
<i>Newman v. United States</i> , 382 F.2d 479 (D.C. Cir. 1967)	34
<i>O'Shea v. Littleton</i> , 414 U.S. 488 (1974)	33
<i>Powell v. Workmen's Compensation Board</i> , 327 F.2d 131 (2d Cir. 1964)	25
<i>Regan v. Sullivan</i> , Dkt. No. 76-6139, slip op. 3777 (2d Cir., May 25, 1977)	46
<i>Rizzo v. Goode</i> , 423 U.S. 362 (1976)	33
<i>Rosenberg v. Martin</i> , 478 F.2d 520, 525 (2d Cir.), <i>cert. denied</i> , 414 U.S. 872, 94 S.Ct. 38 L. Ed. 2d 90 (1973)	45
<i>Russell v. Parratt</i> , 543 F.2d 1214 (8th Cir. 1976)	34
<i>Ryan v. Scoggin</i> , 245 F.2d 54 (10th Cir. 1957)	41
<i>Scolnick v. Winston</i> , 219 F. Supp. 836 (S.D.N.Y. 1963), <i>aff'd sub nom. Scolnick v. Lefkowitz</i> , 329 F.2d 716 (2d Cir. 1964)	38
<i>Sexton v. Barry</i> , 233 F.2d 220 (6th Cir.), <i>cert. de- nied</i> , 350 U.S. 870 (1956)	29
<i>Scott v. University of Delaware</i> , 385 F. Supp. 937 (D. Del. 1974)	25
<i>Sherwin v. United States</i> , 297 F. 704 (5th Cir. 1924)	35
<i>Shifrin v. Wilson</i> , 412 F. Supp. 1282 (D.D.C. 1976)	38
<i>Stockheimer v. Underwood</i> , 428 F. Supp. 192 (W.D. Wis. 1977)	31
<i>Tomko v. Lees</i> , 416 F. Supp. 1137 (W.D. Pa. 1976)	37
<i>Tunnell v. Wiley</i> , 514 F.2d 971 (3d Cir. 1975)	45
<i>United States v. Fujimoto</i> , 102 F. Supp. 890 (D. Hawaii 1952)	36

	PAGE
<i>United States v. Levy</i> , 153 F.2d 995 (3d Cir. 1935)	34
<i>United States v. Nieldelman</i> , 356 F. Supp. 979 (S.D. N.Y. 1973)	35
<i>United States v. Segelman</i> , 86 F. Supp. 11 (W.D. Pa. 1949)	34
<i>United States v. Smith</i> , 523 F.2d 771 (5th Cir. 1976), cert. denied, 45 U.S.L.W. 3249 (U.S. Oct. 5, 1976)	35
<i>United States v. Steel</i> , 283 F. Supp. 580 (S.D.N.Y. 1965)	36, 37
<i>United States v. Strutton</i> , 494 F.2d 686 (2d Cir. 1974)	35
<i>United States v. Testan</i> , 424 U.S. 392 (1976)	3
<i>United States v. Weinberg</i> , 65 F.2d 394 (2d Cir. 1933)	34
<i>United States v. Wolfson</i> , 269 F. Supp. 621 (S.D.N.Y. 1967)	46
<i>United States v. Wortman</i> , 26 F.R.D. 183 (E.D. Ill. 1960)	36
<i>Walker v. Cahalan</i> , 542 F.2d 681 (6th Cir. 1976)	38
<i>Weiner v. Bank of King of Prussia</i> , 358 F. Supp. 684 (E.D. Pa. 1973)	29
<i>Weisman v. LeLandais</i> , 532 F.2d 308 (2d Cir. 1976)	2, 26
<i>Wiskey Cases</i> , 99 U.S. 594 (1898)	34
<i>Women in City Government United v. The City of New York</i> , Dkt. No. 74-2352, slip op. 6139 (2d Cir., Sept. 28, 1977)	25
<i>Yaselli v. Goff</i> , 12 F.2d 395 (2d Cir. 1926), aff'd per curiam, 275 U.S. 503 (1927)	31

	PAGE
<i>Statutes and Rules:</i>	
28 U.S.C. § 1291	2
Rule 12 of the Federal Rules of Civil Procedure	41
Rule 25(d)(1) of the Federal Rules of Civil Procedure	1
Rule 56 of the Federal Rules of Civil Procedure	41
<i>Miscellaneous Authority:</i>	
Note, Delimiting the Scope of Prosecutorial Immunity From Section 1983 Damage Suits 52 N.Y.U.L. Rev. 1973 (1977)	39

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BRIEF FOR DEFENDANTS-APPELLEES

Preliminary Statement

This is an appeal by Louis C. Ostrer, Rita Ostrer, Jack Ostrer, and Dina Gelman (the "plaintiffs") from a June 21, 1976 order of the United States District Court for the Southern District of New York, Robert J. Ward, J., granting William I. Aronwald, Robert B. Fiske, Jr., Alan Naftalis, Marvin Sontag, James Killeen, Edward H. Levi,* and the United States of America's (the "defendants") motion to dismiss the complaint. The District Court's opinion is reproduced in the Appendix ("a") at a270-310.

* No order has been entered substituting Attorney General Bell for the defendant Levi. See FRCP 25 (d) (1).

The jurisdiction of this Court is founded upon 28 U.S.C. § 1291. See *Weisman v. LeLandais*, 532 F.2d 308, 309 (2d Cir. 1976).

Issues Presented

1. Did the District Court err in concluding that the allegations contained in the third cause of action were too vague and conclusory to support a claim for relief?

2. Did the District Court err in concluding that the federal prosecutors were immune from suit?

3. Did the District Court err in concluding that members of the prosecutor's staff had established a good faith defense?

4. Did the District Court err in concluding that the complaint was premature in light of an ongoing grand jury investigation?

Statement of the Case

The plaintiffs Rita and Jack Ostrer and Dina Gelman are all related to the plaintiff Louis C. Ostrer. The defendant Aronwald was the Attorney-in-Charge of the Joint Strike Force Against Organized Crime and Racketeering for the Southern District of New York during 1976. The defendant Naftalis was a Special Attorney in the Strike Force during 1976 and is currently an Assistant United States Attorney in the office of the defendant Robert B. Fiske, Jr., United States Attorney for the Southern District of New York. The defendant Sontag was the Internal Revenue Service's ("IRS") Regional Strike Force Representative in 1976. Mr. Killeen was also an IRS Strike Force Representative in 1976. The defendants Aronwald and Sontag are no longer in Federal service.

The dismissed complaint contained five "causes of action" against the defendants. The plaintiffs, however, do not appeal from the entire order of dismissal. The appeal from the first, second and fifth causes of action has been withdrawn. (Appellants' Brief at 6 n.3). The plaintiffs have withdrawn the appeal insofar as it relates to the defendants Fiske and Levi. (*Id.* at 5 n.2).^{*} Additionally, plaintiffs have withdrawn that aspect of this appeal which relates to enjoining grand jury proceedings. (*Id.* at 9 n.4).^{**}

The only issues presented by this appeal relate to the District Court's dismissal of the third and fourth "causes of action".

Plaintiffs demand \$50 million in damages, of which \$30 million represents punitive damages, against the defendants Aronwald, Naftalis, Sontag and, presumably the United States of America.^{***} In addition, certain in-

* The brief states: "The District Court ruled that the plaintiffs' allegations regarding Levi and Fiske [did] not suffice to state *direct* and personal responsibility for the purported misconduct of their subordinates'. (App. 24). That ruling is not at issue on this appeal, particularly given the structural change in the Strike Force's being absorbed into the United States Attorney's Office. Plaintiffs expect that, at this time, the actions of the former Strike Force members, are subject to closer scrutiny by the United States Attorney. . . ."

** The brief states: "Plaintiffs have not pursued in this appeal the issue of whether pre-indictment relief from the Government's use of certain evidence during the course of the grand jury proceeding should have been granted."

*** The plaintiffs have neither pointed to a waiver of sovereign no waiver of sovereign immunity; hence, no claim for relief has no waiver of sovereign immunity; hence, no claim for relief has been stated against the United States. See *United States v. Texon*, 424 U.S. 392 (1976); *Brown v. General Services Administration*, 507 F.2d 1300 (2d Cir. 1974), *aff'd*, 425 U.S. 820 (1976).

injunctive relief is still being sought. Since the defendants Aronwald and Sontag are no longer federal employees, (*id.* at 5 n.2), the demand for injunctive relief is now focused on defendant Assistant United States Attorney Alan Naftalis. The brief states:

"The pattern of harassment alleged by plaintiffs in Counts 3 and 4 of their complaint continues unabated under the direction of the defendant Naftalis."

The "proof" of this pattern is, as stated by appellants:

"... No indictments have been returned against any of the plaintiffs herein, although, on information and belief, Defendant Naftalis continues to present 'evidence' to that Grand Jury."

Presumably, the plaintiffs seek an injunction restraining defendant Naftalis from presenting evidence to the grand jury.

This appeal encompasses two distinct issues of alleged misconduct by the defendants. The first aspect of the allegations of misconduct are set forth in the third cause of action. These allegations involve (1) leaks to the news media about plaintiff, (2) warnings to business associates of plaintiff Louis C. Ostrer that they should not do business with him, (3) repeated subpoenaing of plaintiff and his business records to various forums, (4) seizure of business records, (5) making disparaging statements concerning Louis Ostrer in open Court and before Congressional committees and other official bodies, and (6) repetitious and overlapping investigations of plaintiff Louis C. Ostrer's affairs (a12-15). The District Court found that "plaintiffs' broad brush portrayal of the defendants as vengeful conspirators [lacked] sufficient substance to state a claim" (a294). The District Court not

only looked to the complaint in its assessment of the conclusory allegations contained in the third cause of action but also considered Mr. Ostrer's extensive twenty-three page affidavit (a111-60) before dismissing the complaint (a293).

The second aspect of the allegations of misconduct is set forth in the fourth cause of action of the complaint. The plaintiffs claim that the defendant prosecutors improperly "demanded" that Mr. Ostrer cooperate with the Government in exchange for an agreement not to prosecute him or his relatives (a15-19). The District Court held that the defendants Aronwald and Naftalis, as prosecutors, were immune from suit (a298-99). Based on a reading of the affidavits submitted by plaintiffs and defendants, the District Court found that the defendants Sontag and Killeen had established the reasonableness of their actions and, consequently, were immune (a299-300). In the alternative, the District Court held that both the third and fourth causes were prematurely commenced (a301-03).

Statement of Facts

A. Proceedings Below

This action was commenced by the filing of the complaint on August 19, 1976. Upon filing the complaint, the plaintiffs secured a temporary restraining order preventing the defendants from presenting certain evidence to the grand jury (a25). The Government was ordered to show cause why a preliminary injunction should not issue. Both sides filed affidavits and memoranda of law and, on August 31, 1976, the District Court vacated the temporary restraining order and denied plaintiffs' motion for a preliminary injunction (a229-36). On December 21, 1976, after service of process was completed the

defendants moved to dismiss the complaint. On February 4, 1977, the plaintiffs filed a memorandum in opposition to the defendants' motion. On June 21, 1977, the District Court granted the defendants' motion to dismiss. A judgment to that effect was entered and this appeal followed (a2-3).

B. The Complaint*

The third cause of action accuses the defendants of engaging in "a conspiratorial effort to discredit the Plaintiffs in order to deprive them of their means of livelihood" (Complaint ¶ 25, a13). The allegations comprising this cause of action are contained in five numbered paragraphs of the Complaint (Complaint ¶¶ 24-29, a12-15). The focal point of this cause of action is contained in paragraph 26 of the complaint:

"The aforesaid conspiratorial effort has been accompanied by a pattern of harassment and defamation aimed against the Plaintiffs. As part of such pattern of harassment, the Defendants, in cooperation with other state and Federal law enforcement agencies, have done, *inter alia*, the following:

- a) They have or are attempting to summon the Plaintiffs before several grand juries, lo-

* The District Court's dismissal of the first, second and fifth causes of action is not at issue on this appeal. The first and second causes of action, in essence, allege that the plaintiff, Louis C. Ostrer was the subject of unlawful electronic surveillance conducted by New York State authorities and that he testified, under a grant of transactional immunity, before a New York State grand jury. He complains that the federal investigation into his tax affairs is, thus, tainted (a8-12). In the fifth cause of action, Mr. Ostrer complains that a document entrusted by his attorney, Alan M. Dershowitz, to a colleague came into the possession of the Government without his permission (a20-21).

cated in different jurisdictions, at approximately the same, or overlapping, or proximate times, to give testimony or evidence on essentially the same subjects and events;

b) they have raided, seized, subpoenaed and otherwise appropriated Plaintiffs' business records time and time again, frequently before different grand juries in disparate jurisdictions at the same or nearly the same time, with the aim of depriving the Plaintiffs of their records and of thereby making it impossible for them to conduct their business affairs in an orderly fashion, as a result of which some of the Plaintiffs' business enterprises have failed, and losses of millions of dollars have been incurred;

c) they have leaked to the news media, to the business world, and to the public in general, defamatory stories about the Plaintiffs aimed at eroding confidence in the integrity and ability of the Plaintiffs and in injuring their ability to do business;

d) they have made statements in open court and before Congressional committee inquiries, hearings and investigations, casting aspersions on and innuendos against the Plaintiffs' integrity, all without sufficient proof of criminal wrongdoing to sustain indictment and conviction, with subsequent publication of many such statements, aspersions and innuendos;

e) they have, in cooperation with other state and federal law enforcement and other agencies, tried to dissuade Plaintiffs' business associates from doing business with Plaintiffs by persuading such associates either that the Plaintiffs are dishonest, or that it is dangerous to associate with Plaintiffs;

f) they have engaged in repetitious and overlapping investigations of Plaintiffs' affairs year after year on a continual basis, in an attempt to wear down and exhaust the Plaintiffs, to distract them from their business affairs, and to cause them to expend exorbitant sums for legal and other professional representation." (a13-14).

As a result of the above allegations, the plaintiffs claim that they have been deprived:

"... of their rights under the First Amendment (freedom of speech and association), Fourth Amendment (freedom from unreasonable search and seizures), and Fifth Amendment (taking of property and liberty without due process of law), and all the penumbras emanating from those constitutional amendments." (Complaint ¶ 29, a15).

The fourth cause of action charges that the defendants "have set upon a course of action aimed at forcing the Plaintiff Louis C. Ostrer to divulge to them everything he knows about such officials and all the details of his business dealings with such labor unions and labor union officials" (Complaint ¶ 30, a16). The allegations comprising this cause of action are contained in paragraphs 30 through 44 of the complaint (a15-19). The thrust of the fourth cause of action is contained in paragraph 33 of the complaint:

"As part of the aforesaid efforts to elicit information and testimony from Louis C. Ostrer, the Defendants have threatened, in the absence of Louis C. Ostrer's telling the Government what it wants to hear, to indict Louis C. Ostrer as well as members of his family, including Plaintiffs Jack

Ostrer, Rita Ostrer, and Dina Gelman, as well as his eldest son Benjamin Ostrer (not a plaintiff herein)" (a17).

Mr. Ostrer alleges that "he does not possess the information the authorities seek" (Complaint ¶ 32, a17) and that the authorities are "holding [his] relatives hostage unless and until he frees them with the 'ransom' of testimony . . ." (Complaint ¶ 35, a17-18).

The fourth cause of action focuses on two events which defendants' alleged conduct could cause. First, plaintiffs express a concern regarding the ability of Mr. Ostrer's son to become admitted to the Bar (Complaint ¶ 36, a18). In fact, as Appellants' Brief indicates, during the pendency of this action, the son has become a member of the New York Bar. (Appellant's Brief at 5 n.2). Second, plaintiffs complain that "[t]he Defendants plan to go forward with these prosecutions [of relatives], in the absence of cooperation by Louis C. Ostrer, even if it does not believe it can win the cases before a petit jury" (Complaint ¶ 38, a18).

These allegations, plaintiffs contend, establish that the defendants violated the criminal laws of the State of New York (Complaint ¶ 39, a18-19); violated their ethical responsibilities as prosecutors and members of the Bar (Complaint ¶ 41, a19), and have violated the ". . . plaintiffs rights under the First and Fifth Amendments" (Complaint ¶ 40, a19).

C. The Affidavits

During the course of the litigation in the District Court, several affidavits were introduced into the record. The plaintiff Louis C. Ostrer submitted an affidavit (a111-60) as did attorneys representing Mr. Ostrer and various relatives (Alan Dershowitz, Esq., chief counsel for plaintiffs-appellants (a173-80); Harvey A. Silvergate, Esq., co-counsel for plaintiffs-appellants (a161-72); and Richard H. Wynn, then counsel for plaintiff Dina Gelman and "at times" Louis C. Ostrer (a181-85)).* The defendants submitted four affidavits (Aronwald, a222-28; Naftalis, a323-25; Sontag, a314-20; Killeen, a321-22).**

The affidavits submitted relate to the two distinct aspects of this appeal. Mr. Ostrer's affidavit is primarily concerned with the third cause of action. The attorneys' affidavits relate to the fourth cause of action. To a certain extent, Mr. Ostrer incorporates the substance of the attorneys' affidavits in his affidavit. (Ostrer Affidavit ¶¶ 2, 3, 4, a111-12).

1. The Ostrer Affidavit

Mr. Ostrer claims that for six years he has been harassed and coerced by federal and state officials in an effort to gain his cooperation (*id.* ¶ 5, a112-13). It is

* It is somewhat unclear exactly which plaintiff was being represented by which attorney prior to the initiation of this lawsuit. The complaint indicates that Mr. Dershowitz represents Louis C. Ostrer; Mr. Silvergate, Rita Ostrer (Louis C. Ostrer's wife); Mr. Atlas of Wynn & Atlas, Jack Ostrer (Louis C. Ostrer's father), and Mr. Wynn of Wynn & Atlas, Dina Gelman (Louis C. Ostrer's sister) (a 23-24).

** The plaintiffs submitted an affidavit of Nancy Rosner, Esq. (a186-88) in connection with the fifth cause of action, the dismissal of which is not being appealed. The Rosner affidavit, therefore, will not be discussed.

his belief that any indictments that might result from a grand jury investigation in the Southern District of New York would be damaging to his family and groundless (*id.* at a113). Mr. Ostrer claims that the grand jury investigation, in light of the prosecutor's willingness to abandon it in exchange for Mr. Ostrer's cooperation, as relayed to him by his attorneys, is cruel and reckless. He states that this point can only be fully appreciated against the backdrop of a six-year pattern of harassment "by government officials at all levels . . ." (*id.* ¶ 6, a114).

It is alleged that the New York County District Attorney established surveillance of Mr. Ostrer in 1972 and that this surveillance continues to date. This surveillance, it is alleged, resulted in a search of Mr. Ostrer's offices on February 21, 1973 (*id.* ¶ 8, a114). Mr. Ostrer claims that the search was "leaked to the press . . . by the D.A.'s office . . ." (*id.*). Records were allegedly seized and retained for approximately nine months (*id.* at a115). The District Attorney was ordered to return the records, but, it is contended, the District Attorney's office requested the IRS to serve an administrative summons in order to insure that the District Attorney's office would not have to return the records.* The records were not returned for an additional eight months, during which time the District Attorney's office and the IRS examined them (*id.*).

Mr. Ostrer claims that all of his records, although the search was ultimately declared illegal, were never

* The record indicates that Internal Revenue Agent Edward J. Martin, not a defendant in this action, received the documents from the District Attorney's office and returned the documents to a Mr. Kilroy (a84-110). The Commissioner of Internal Revenue's administrative summons was signed by Mr. Martin (a153).

returned (*id.* ¶ 9, a115).^{*} It is stated that the seizure gave federal and state authorities the "opportunity" to review the records (*id.* ¶ 10, a115) (emphasis added). Nevertheless, the same records have been the subject of repeated subpoenae (*id.* at a115-16). The records were examined by the United States Senate Permanent Subcommittee on Investigations of the Committee on Government Operations for two years (*id.* ¶ 10, a116). Now they are the subject of new subpoenae by grand juries in Detroit and the Southern District of New York (*id.* at a116).^{**} The records were subpoenaed by the United States Department of Labor on the day after they were subpoenaed by the New York grand jury (*id.*). No one from the Department of Labor is a defendant here.

Mr. Ostrer claims that he was arrested by the New York City police and that in a related court proceeding the Assistant District Attorney stated that Mr. Ostrer's life was in danger and that since he had important information he should be incarcerated for protection (*id.* ¶ 11, a116-17). As a result, Mr. Ostrer states that he was jailed as material witness until he posted a \$250,000 bond. He was rearrested for violation of parole immediately after posting the bond and incarcerated for a weekend (*id.* at a117). The events were publicized and caused Mr. Ostrer and his family embarrassment and humiliation (*id.*). These events were allegedly engineered by an Assistant District Attorney who, it is alleged, worked closely with federal investigators and prosecutors (*id.* ¶ 12, a118).

^{*} A letter from the District Attorney's office supports Mr. Ostrer's statement that the District Attorney's office retained some documents (a135).

^{**} The subpoenae, on their face, are not directed to any of the plaintiffs but rather to corporate entities or unions. See a143-60.

Mr. Ostrer's next claim is that various, unidentified federal agents have continually stated that he is on a "hit list" for mob extermination and should, therefore, cooperate with the Government in order to be protected (*id.* ¶ 13, a118-19). A reporter in Detroit is alleged to have informed Mr. Ostrer that she had been told by FBI agents that Ostrer was to be killed. She suggested he seek protection from federal authorities (*id.* ¶ 14, a119), thereby causing him great harm and embarrassment. It is alleged that a 1971 federal action in which Mr. Ostrer was convicted, was also motivated by a desire to coerce him. He states that his attorney was informed that he could escape prosecution in exchange for his testimony (*id.* ¶ 14, a120).

Mr. Ostrer alleges that all of these encounters with the state and federal government have resulted in extensive adverse publicity (*id.* ¶ 15, a120). Specifically, a Florida reporter is alleged to have broadcast an untrue story about Mr. Ostrer being investigated by the Justice Department in Miami (*id.* at a120-21).

Mr. Ostrer alleges that an IRS agent interviewed a stamp dealer with whom he does business. The stamp dealer was allegedly warned to stop doing business with Mr. Ostrer (*id.* 16, a121).^{*} Moreover, after the seizure of his records by the District Attorney, it is alleged that New York City detectives interviewed Mr. Ostrer's suppliers to determine if any of the goods that Mr. Ostrer supposedly purchased from the suppliers had been stolen (*id.*).

Mr. Ostrer, turning to another subject, states that he *believes* that many of his problems are a result of pressure being exerted upon Government agencies by the

^{*} The agent identified, a Special Investigator Ryan (a141), is not a defendant in this action.

Permanent Subcommittee on Investigations of the Committee on Government Operations of the United States Senate (*id.* ¶ 17, a121-22). He states that it is clear to him that the Labor Department, the Department of Justice and the Strike Force are attempting to gain favor with the Subcommittee by harassing him and his family (*id.* ¶ 18, a122-23).

Mr. Ostrer discusses his belief that evidence being reviewed by the grand jury is tainted (*id.* ¶ 19-22, a123-28).^{*} Mr. Ostrer claims that the New York State Insurance Department ("NYSID"), the IRS and the New York County District Attorney were in constant contact with one another with respect to his activities (*id.* ¶ 23, a128). He claims that the IRS has been working with the Strike Force and that an investigation by the IRS of his father and son is apparently responsible for the Strike Force's "plan to indict them for conspiracy" (*id.* at a128-29). It is also alleged that the Strike Force intends to subpoena NYSID records concerning Mr. Ostrer (*id.* ¶ 23, a129).

Mr. Ostrer claims that he was given immunity when he testified before a New York State Grand Jury in 1974. He believes that the IRS and NYSID had access to a transcript of this testimony and used it as a source for further inquiry (*id.* ¶ 24, a129).

Mr. Ostrer then summarizes all of the state actions against him (*id.* ¶ 25, a130-31). He states that he believes that a similar pattern of harassment is involved in the present grand jury investigation (*id.* ¶ 26, a131). He states that he believes that the grand jury investigation resulted because he was attempting to overturn his

^{*} This issue is not before the Court, hence a full summary of this portion of the affidavit has not been included.

prior federal conviction (*id.* at a132). He then states that he has suffered serious injury as a result of being harassed (*id.* ¶ 27, a132-33).

2. The Attorneys' Affidavits

The affidavits submitted by plaintiffs' attorneys, in summary, state that at various times, members of the Strike Force offered to abandon the present grand jury investigation of the Ostrers in exchange for Louis Ostrer's agreement to cooperate with the Strike Force with respect to its interest in certain union officials' activities. This proposal, it is alleged, was made by defendants Aronwald and Naftalis during meetings which took place on May 18 and June 11, 1976. The defendants Killeen and Sontag were present at the June 11 meeting but were not at the May 18 meeting. It is alleged that, during the June 11, 1976 meeting, Mr. Sontag stated that the IRS had recommended against presenting evidence to a grand jury with respect to Benjamin Ostrer's activities (a168). Mr. Silverglate states in his affidavit that Mr. Sontag made it clear at the outset of the June 11, 1976 meeting that the possible indictments were not intended to punish Louis Ostrer (a167). Nevertheless, the content and tone of the plaintiffs' attorneys affidavits, collectively, are intended to support a contrary conclusion.

3. The Defendants' Affidavits

Aronwald's affidavit begins with a discussion of his knowledge of prior state proceedings in which Louis Ostrer was embroiled (a222). He denies knowledge of such proceedings prior to the time that a Strike Force investigation had progressed to the grand jury stage. Moreover, he firmly states that the Strike Force investigation did not use the fruits of the tainted state proceedings (a222-24).

Aronwald states that during a meeting on May 18, 1976 between he and Mr. Richard Wynn and Mr. Jeffrey Atlas, attorneys for the Ostrers, a discussion took place with respect to the Strike Force investigation of the plaintiffs (a224).^{*} The Ostrers' attorneys had requested the meeting (a324). During this meeting the subject of Louis Ostrer's cooperation was raised and Mr. Aronwald indicated that the Government was interested in Louis Ostrer's cooperation (a225). It was stated that in exchange for such cooperation that it was possible that Mr. Ostrer's family would not be indicted (a225). An example of a similar arrangement in another investigation was discussed. Mr. Wynn and Mr. Atlas had been involved in the other investigation and were therefore familiar with the mechanics of the arrangement (a225).

Subsequently, at the prompting of Mr. Wynn, a second meeting of June 11, 1976 took place between Messrs. Wynn, Dershowitz, Silvergate, Naftalis, Aronwald, Sontag and Killeen (a225-26).

During the second meeting the ramifications of the investigation on Benjamin Ostrer's future were discussed with Mr. Aronwald concluding that they were not relevant to the investigation (a226). Throughout the meeting, it was made clear that if evidence established criminal violations, indictments would be sought (a227).

In response to Dershowitz and Silvergate's inquiries into the kind of cooperation that would be meaningful, it was indicated that Louis C. Ostrer's testimony with regard to organized crime figures was desired and that the Government also wanted any information that the family members might have (a227).

^{*} Mr. Naftalis was also present at this meeting.

After the meeting, Mr. Aronwald was informed by Naftalis that Dershowitz had called and stated that cooperation was out of the question and that it was his view that the Government was "ransoming off" Louis Ostrer's relatives (a227). Mr. Aronwald directed Mr. Naftalis to inform Mr. Dershowitz that the Government no longer wished to discuss cooperation and that the grand jury investigation would continue (a228).

Mr. Naftalis' affidavit contains a statement of concurrence with the Aronwald affidavit (a323). The remainder of his affidavit is not relevant to the issues before this Court.

Mr. Sontag stated that an IRS investigation indicated that the plaintiffs may have violated criminal provisions of the Internal Revenue Code of 1954 (a315). The matter was therefore referred to the Department of Justice.

He goes on to state that he was at the June 11, 1976 meeting and that one of the defense counsel indicated that Mr. Ostrer was considering cooperation with Federal authorities (a315-16). He states that there was no intent to punish Mr. Ostrer by the investigation of his family (a316). He states that, to the contrary, it appeared that Ostrer had subjected his family to investigation by involving them in his business activities (a316).

Mr. Sontag indicated that the IRS had not investigated Benjamin Ostrer and that he was not even sure which of Mr. Ostrer's sons Benjamin was. He stated that he was not in a position to say whom the evidence from an investigation might implicate, and suggested that Mr. Ostrer would know better than anyone else at this juncture (a317). Mr. Naftalis is alleged to have stated that agencies other than the IRS had uncovered evidence of wrongdoing by Benjamin. Louis Ostrer's safety,

should he decide to cooperate, was briefly discussed (a318). Inquiries by plaintiffs' counsel regarding Jack Ostrer were not answered because his counsel was not present (a319).

Finally, Mr. Sontag stated that he acted in the line of his official duty in his investigation of plaintiffs (a319). Moreover, he stated that all actions he took were in good faith with the belief that they were lawful (a319).

Mr. Killeen's affidavit concurs with that of Mr. Sontag and also contains the statement that Mr. Killeen acted in good faith with the belief that his actions were lawful (a321-22).

ARGUMENT

POINT I

The Vague and Conclusory Allegations Contained in the Third Cause of Action Do Not State a Claim For Which Relief Can Be Granted.

The plaintiffs argue that they have satisfied the basic notice pleading requirements of the Federal Rules of Civil Procedure (Appellants' Brief at 24-30). They state that "[c]ourts in this Circuit have consistently read complaints charging civil rights violations in a liberal, generous manner . . . to avoid summary dismissal of important claims" (Appellants' Brief at 26). As discussed below, the cases relied upon by appellants are inapposite. Indeed, the plaintiffs acknowledge that this Circuit has consistently held that a civil rights complaint may properly be dismissed if it contains only "conclusory", "vague" or "general allegations" (Appellants' Brief at 26 n.15). The third cause of action states, in general terms, that the defendants are participants in a conspiracy to harass and coerce plaintiff Louis Ostrer

into cooperating with federal authorities who are interested in the activities of certain union officials. This, the plaintiffs claim, represents a deprivation of their Constitutional rights.

It is not clear which of the defendants have participated in the alleged wrongful acts or whether some of the defendants participated in some of the acts while not participating in others. The nature of the participation is also not discernible from the pleadings. Is it claimed that all of the defendants made statements in open court and before Congressional committees? Or is it claimed that some of the defendants made the statements, while others acquiesced? Surely, Aronwald could have made statements for which Naftalis would not necessarily be responsible; while, conceivably, Naftalis could make statements for which Aronwald could be responsible.

Of equal importance is the nature and approximate time of the alleged wrongful conduct. Plaintiff should not be permitted to allege in a broad all encompassing fashion misconduct so serious and potentially damaging to the defendants. Such imprecise allegations do not provide defendants with notice of the claims plaintiffs may have against each of them.

A. Plaintiffs Fail To Satisfy Pleading Requirement

Freewheeling pleadings containing conspiracy allegations of constitutional violations by federal officials do not serve to state a cause of action. *Koch v. Yunich*, 533 F.2d 80, 85 (2d Cir. 1976). In *Black v. United States*, 534 F.2d 524 (2d Cir. 1976), the plaintiff alleged that IRS agents had harassed him by stating to his clients that the IRS intended to get him and by insinuating in conversations with him that he was biased. This Court stated:

"A complaint against public officials alleging the deprivation of constitutional rights must *detail* the basis of that claim with greater specificity than

appellants have here provided". *Id.* at 528 (emphasis added).

The standard announced in *Black* is controlling here.

The policy behind this pleading requirement was recently addressed by Judge Weinfeld in *Morpurgo v. Board of Higher Education*, 423 F. Supp. 704 (S.D.N.Y. 1976), a case involving state and federal defendants. The District Court held, in dismissing the *pro se* complaint:

"Although not much amenable to legal analysis, the complaint does allege some sort of vast but peculiarly impenetrable conspiracy to prevent plaintiff from continuing her education and from obtaining employment in any research projects. But were the vague, conclusory allegations contained in the complaint deemed sufficient to withstand a motion to dismiss, an unwarranted burden of defense would be placed on the movants. Thus, in the Second Circuit, complaints based on the conspiracy provisions of the Civil Rights Act cannot rest on vague and conclusory allegations but must 'allege with at least some degree of particularity overt acts which defendants engaged in which were reasonably related to the promotion of the conspiracy.' Similarly, when a direct deprivation of rights is claimed under section 1983, the plaintiff must allege the defendant's direct and personal responsibility for the purportedly unlawful conduct of his subordinates. This standard has been applied when federal officials are sought to be held liable in private suits based on causes of action arising under the Constitution." 423 F. Supp. at 713 (footnotes omitted).

The plaintiffs here are not *pro se* but have been represented by several counsel throughout the course of this litigation. Even with the able assistance of counsel, the

complaint, as amplified by the Ostrer affidavit, fails to meet the *Black* standard. Thus defense of this action would place a "unwarranted burden" on the defendants. See *Jacobson v. Organized Crime & Racketeering Section*, 544 F.2d 637, 639-40 (2d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3666 (U.S. Apr. 5, 1977); *Martin v. Merola*, 532 F.2d 191, 198 (2d Cir. 1976) (Lumbard & Gibbons, JJ., concurring) (*per curiam*).

The District Court began its analysis of the third cause of action with a reference to Louis Ostrer's affidavit (a293). Though the affidavit provides some detail to the alleged conspiracy it also demonstrates the frivolity of the third cause of action. Plaintiff begins the affidavit with his attorneys' reports on the June 11, 1976 meeting with the defendants. He states that the defendants' efforts to gain his cooperation are the latest and most vicious in a series of efforts by law enforcement agencies to coerce him into cooperation. (Ostrer Affidavit ¶ 6, a114). He outlines a six-year history of his encounters with an assistant District Attorney, several New York State agencies, a Congressional Committee, various FBI agents as well as IRS agents, and several newspaper reporters. He states that he believes that all of these agencies and people are participants in a broad conspiracy to ruin him. Not one of the defendants is identified as one Mr. Ostrer's antagonist.

The unconnected, disparate events described in the affidavit are viewed by plaintiffs as a pattern of intentional actions to destroy Louis Ostrer (a130). Mr. Ostrer states at page 20 of his affidavit:

"25. As can be seen from the factual pattern adduced above, Governmental authorities have tended to increase the pressure against me at such times when it has appeared to them that their previous attempt to 'break' me ended in failure. For example, as has been noted in more detail earlier in this affidavit:

(a) State authorities had me placed in the Civil Jail and held as a 'material witness' to no crime at all, with a bail bond set at an exorbitant quarter of a million dollars. When I posted a bond and was released, I was re-arrested on my way home from the Civil Jail and placed in the Tombs because of an alleged probation violation.

(b) I was subpoenaed to testify before a New York County grand jury, and I did so. When I testified truthfully and said nothing in contradiction to anything that the D.A. had earlier learned from the wiretap and eavesdrop tapes, thereby averting an indictment for perjury, the D.A. had me indicted on a frivolous charge of evasive answers, which indictment was later dismissed. This indictment came the same day I was to be released from probation on my state conviction—April 19, 1976.

(c) When I obtained an order from the Supreme Court of New York County that the D.A. return to me my illegally seized records, the IRS promptly cooperated with the DA in thwarting that order by summoning these same records directly at the DA's office and keeping them there, thereby continuing this major obstruction to my business.

26. This same pattern can be seen in the current investigation and grand jury proceeding involved in this case. . . ." (a130-31).

Thus, Mr. Ostrer concludes that the defendants are also participants in this universal conspiracy to discredit him and thereby coerce him into cooperating. Unfortunately, he does not even attempt to provide a nexus between the six-year history and the defendants.

Neither the complaint nor the affidavit contain a single reference to the defendants. The plaintiffs have clearly

failed to set forth the interrelationship between the defendants and the acts which others are alleged to have committed over the six years summarized in the affidavit. Moreover, the Ostrer affidavit, plainly indicates that the complaint in general, and the third cause of action specifically, embody nothing more than conclusions and unsupported allegations of a vague conspiracy.

Surely, Mr. Ostrer's historical conspiracy theory presents exactly the kind of danger which this Court had in mind in *Jacobson v. Organized Crime & Racketeering Section*, *supra*:

"The argument that appellants were 'singled out and thus deprived of the equal protection of the law' has a hollow sound when it is recalled that there is no dispute that the withholding taxes were not only due but they were actually paid in full. *Were this court to find that such allegations constitute a claim for relief the result would be countless 'constitutional tort' suits by criminals who are arrested or prosecuted, from alleged narcotics importers and distributors on down to muggers, those parking or speeding violators who receive tickets from the police and so on endlessly, as each one of these would say he was 'singled out' and given discriminatory treatment.*

"Part of the relief granted to defendants by Judge Neaher was the quashing of a variety of subpoenas that appellants had issued in connection with the hearing on the application for a preliminary injunction. *The issuance of these subpoenas is some indication of what would happen if we held that the mere use of the rhetoric of conspiracy and harassment, supplemented by claims of many millions of dollars of damages against these individual revenue agents, was sufficient to state a claim for relief in this type of suit.*" 544 F.2d at 640 (emphasis added).

Contrary to the labored effort of plaintiffs to distinguish *Jacobson*, the similarity in the conclusory allegations are striking. Judge Ward succinctly pointed out these similarities in his opinion below:

"Certain of the plaintiffs' claims are reminiscent of *Jacobson v. Organized Crime & Racketeering Section*, 544 F.2d 637, 638 (2d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3666 (U.S. Apr. 5, 1977). *Jacobson and Ranger Bakers, Inc.*, a company of which he was president, sued the Internal Revenue Service and four agents. As the Second Circuit observed:

Ranger maintains that its financial problems were caused by the concerted efforts of the Organized Crime and Racketeering Section of the Department of Justice and the Internal Revenue Service, which, it claims, were resolved to drive it out of business. Appellants alleged that the Organized Crime Section, carrying on a "personal vendetta" against the Jacobson family (App. 7a, 26a), "leaked" to a New York City newspaper a story which appeared in May 1975 to the effect that Jacobson was a front for his father, Sam, who, the article asserted, manages an underworld gambling cartel. Appellants also alleged vaguely that the Organized Crime Section intimidated and spread "false and malicious stories" among plaintiffs' customers, vendors, and banks in an effort to dissuade them from dealing with or extending credit to appellants. They claim it was as a result of the consequent loss of business and credit that they were unable to meet their federal tax obligations.

"The Second Circuit noted the 'use of the rhetoric of conspiracy and harassment, supplemented by claims of many millions of dollars of damages against these individual revenue agents.' *Id.* at 640. The Court affirmed the dismissal of the complaint saying, *inter alia*, that, '[w]ith respect to

the large money damage claims against the IRS and the individual revenue agents, the vague and conclusory allegations clearly state no claim for relief.' *Id.* at 639." (a293-94).

In the instant case the allegations are far more conclusory than those described in *Jacobson*. In summary, a reading of the complaint together with the Ostrer affidavit fails to provide the slightest hint of an event connected to any of the defendants. Plaintiffs merely summarize Ostrer's experiences with law enforcement agencies and fashion these events into violations of Ostrer's due process rights through the vehicle of conclusory allegations. All of these events are then neatly laid at defendants' doorsteps. Furthermore, plaintiffs' allegations of past harassment have a hollow sound equal to that found in *Jacobson* when it is recalled that Louis Ostrer was convicted in the New York Supreme Court in 1969 and again in the Southern District of New York in 1974 (Appellants' Brief at 12 n.8).

The District Court's dismissal was consistent with the standards set forth in *Black* and *Jacobson* and should be affirmed. See *Koch v. Yunich*, *supra*, 533 F.2d at 85; *Martin v. Merola*, *supra*, 532 F.2d at 198; *Fine v. City of New York*, 529 F.2d 70, 74 (2d Cir. 1975); *Kauffman v. Moss*, 420 F.2d 1270, 1275 (3d Cir.), *cert. denied*, 400 U.S. 846 (1970); *Powell v. Workmen's Compensation Board*, 327 F.2d 131, 137 (2d Cir. 1964); *Scott v. University of Delaware*, 385 F. Supp. 937, 944-45 (D. Del. 1974).*

* Nor is it a defense for plaintiffs to claim that they should be permitted to use undifferentiated pleadings to obtain discovery in order to determine whether they have a cause of action against each of the named defendants (Appellants' Brief at 30). See, e.g., *Kadar Corp. Milbury*, 549 F.2d 230, 233 n.2 (1st Cir. 1977); *Cohen v. Illinois Institute of Technology*, 524 F.2d 818, 827 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976). The suggestion begs the issue. Cf. *Women in City Government United v. The City of New York*, Dkt. No. 74-2352, slip op. 6139, 6150-51 (2d Cir. Sept. 28, 1977) (Mansfield, J., Concurring).

B. The Cases Relied On By Plaintiffs Are Inapposite

Plaintiffs cite several cases for the proposition that complaints charging civil rights violations are to be liberally read (Appellants' Brief at 26). These cases are clearly distinguishable from the case at bar.

In *Weisman v. LeLandais*, 532 F.2d 308, 311 (2d Cir. 1975), the allegations of the complaint were very specific. The plaintiffs alleged that the defendant in cooperation with specific police departments caused their false arrest on November 5, 1972, November 7, 1972 and November 12, 1972. Specifically, it was alleged that on November 5, 1972 the defendants caused plaintiff Weisman to be arrested, detained and beaten by the police. It was further claimed that the police upon falsely charging plaintiff with possession of a dangerous weapon attempted to cover up the falsity by charging plaintiff with being a fugitive. Plaintiff was then held without bail until this charge was determined to be false. It was alleged that defendants caused plaintiff to be arrested on November 7, 1972 on an harassment charge which was also dismissed on May 12, 1973 as a result of the defendants failure to appear in Court. It was also alleged that, with the cooperation of the police, specific defendants caused plaintiffs to be arrested on November 12, 1972 on an assault charge which was also proven to be false. Clearly the degree of specificity in this case does not even approach that of the *LeLandais* case. Plaintiffs in this case have not charged defendants with a specific act at a specific time. They have simply charged defendants with responsibility for all of the problems which they have encountered in six years.

Build of Buffalo v. Sedita, 441 F.2d 284 (2d Cir. 1971), involved a class action in which top city officials were charged with a conspiracy to violate the civil rights of a number of organizations and individuals through the

uncontrolled activities of an apparently lawless police department over many years. With respect to the broad allegations this Court stated:

"After alleging broadly that defendants have engaged in illegal 'acts of violence, intimidation, humiliation, and other . . . misconduct' plaintiffs enumerate fourteen separate varieties of police abuses to which they have allegedly been subjected. There follows what might be described as a bill of particulars reciting in seventeen lettered paragraphs specific instances of the kinds of abuses complained of." 441 F.2d at 288.

Chief Judge Lumbard, in a concurring opinion, described the complaint as "detailed and specific . . ." *Id.* at 290. The officials who were named defendants in the *Sedita* case were directly responsible for the conduct of the police officers over the years in question. Thus, their connection with the specific acts outlined in the complaint was clear. Moreover, as this Court pointed out, the specific acts of misconduct were clearly enunciated in *Sedita*. No such claim can be made in the present case.

Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970), and *Holmes v. New York Housing Authority*, 398 F.2d 262 (2d Cir. 1968), involved allegations that the policies and regulations of the Housing Authority were discriminatory and violated the plaintiffs' constitutional rights. In *Escalera*, this Court stated that it was not clear whether the lower court determination was a summary judgment or a dismissal under Rule 12(b). It went on to state that in either event there were disputed questions of fact. This finding was made after a review of an extensive and detailed record. In both cases, the manner of the violation of rights was specified, as was the institution which allegedly was responsible. The connection between the

violations and the institution was unquestionable. Furthermore, in neither case was there even a hint of a challenge to the allegations of complaint on the basis of their broad and conclusory nature.

In *Heese v. DeMatteis Development Corp.*, 417 F. Supp. 864 (S.D.N.Y. 1976), the District Court held that a complaint in which resident shareholders of a middle income cooperative apartment project alleged that they were forced to pay higher carrying charges on rentals than those represented in an information bulletin upon which they relied when purchasing shares, because the New York City Housing Authority failed to properly supervise construction, sale and management of the project, stated a cause of action. The allegations of the complaint which are summarized in approximately one full page of the opinion are quite specific. Finally, *Dunleavy v. Ternullo*, 410 F. Supp. 1166, 1169 (S.D.N.Y. 1976), has no possible application to the case at bar. This was a case in which a *pro se* plaintiff prisoner challenged the constitutionality of certain conditions of his incarceration.*

C. Defendants Do Not Admit The Allegations In the Complaint

In an effort to lend support to their arguments, plaintiffs have peppered their brief with the well established principle, that is often too loosely cited, that a motion to dismiss the action for failure of the complaint to state a cause of action for which relief can be granted carries with it an admission of all the well-pleaded allegations

* Likewise inapposite are those *pro se* prisoner cases emanating from the Northern District of New York. See, e.g., *Cunningham v. Ward*, 546 F.2d 481, 482 n. 1 (2d Cir. 1976). The plaintiffs here were not proceeding *pro se* nor was the complaint dismissed *sua sponte*.

in the complaint (Appellants' Brief at 11, 18, 19, 20 and 45). This argument completely ignores the thrust of the District Court's finding that the complaint is too vague and conclusory. It is axiomatic that a motion to dismiss does not carry with it an admission of unwarranted or unsupported conclusions of fact or law. *Blackburn v. Fiske University*, 443 F.2d 121, 124 (6th Cir. 1971) (conspiracy allegations); *Cole v. Cardoza*, 441 F.2d 1337, 1342 (6th Cir. 1971); *Sexton v. Barry*, 233 F.2d 220 (6th Cir.), cert. denied, 352 U.S. 870 (1956); *Weiner v. Bank of King of Prussia*, 358 F. Supp. 684, 693 (E.D. Pa. 1973); *Cooper Agency, Inc. v. McLeod*, 235 F. Supp. 276, 281 (E.D.S.C. 1964), aff'd, 348 F.2d 919 (4th Cir. 1965).

If it is presumed that the allegations presented in Count Three of the complaint are admitted, such a presumption could have a tragic and unintended effect upon defendants. This case serves as a perfect example of the danger inherent in unsupported conclusory allegations of conspiracy. Plaintiffs have set forth these broad conclusory allegations of egregious wrongdoing on the part of public officials with either the intent or effect of damaging their reputations. Moreover, they attempt to use a legal construct to establish that these individuals *admit* to such wrongdoing. This is urged notwithstanding the fact that the allegations plainly do not satisfy the pleading requirements established by this Court in *Black*. More important, this construction is urged even though the allegations are refuted by the underlying specifications proffered by plaintiffs in the Ostrer affidavit.

POINT II

The District Court Correctly Concluded That the Defendants Aronwald and Naftalis Were Immune From Suit.

It is plaintiffs' contention that the defendants expressed an intent during the June 11, 1976 meeting to procure grand jury indictments against them, notwithstanding the fact that evidence being presented to the grand jury may not be sufficient to convict them. See ¶ 38 of the Complaint, a18. Thus, plaintiffs contend that the defendants Naftalis and Aronwald are not entitled to the immunity normally provided prosecutors.

At the outset it should be noted that the meetings which plaintiffs' counsel had with the defendants were initiated by plaintiffs' counsel (a224-26). During the course of these meetings all that defendants did was essentially respond to specific questions posed by plaintiffs' counsel regarding potential targets of the investigation and possible cooperation (a161-72, a173-80, a181-85).*

A. Prosecutorial Immunity Applies

It is axiomatic that prosecutors are immune from suit for acts committed in the performance of duties imposed upon them by law. The underlying basis of the fourth cause of action is the conduct of defendants Naftalis and Aronwald in the initiation of a prose-

* These very same attorneys are now serving the dual role of advocates and witnesses in this action. This posture poses peculiar ethical problems, as has been noted by this Court. *In re Rappaport*, Dkt. No. 77-3013, slip op. 4181, 4187-88 (2d Cir., June 14, 1977); *J. P. Foley & Co. v. Vanderbilt*, 523 F.2d 1357, 1359 (2d Cir. 1975).

cution. In *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976), the Supreme Court stated, as had many other courts earlier, that prosecutors are immune for all acts committed in the course of "initiating a prosecution." The Supreme Court relied heavily upon *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927). In *Goff*, the appellant claimed that a Special Assistant Attorney General of the United States maliciously procured his grand jury indictment by false and misleading evidence. This Circuit found that the prosecutor was protected by the principles encompassing a prosecutor's absolute immunity.

"In our opinion the law requires us to hold that a special assistant to the Attorney General of the United States, in the performance of the duties imposed upon him by law, is immune from a civil action for malicious prosecution, although it results in a verdict of not guilty rendered by a jury. The immunity is absolute and is grounded on principles of public policy." 12 F.2d at 406.

Imbler v. Pachtman succinctly reaffirmed the above principle by stating that the common law rule of immunity expressed in cases such as *Goff* is as applicable to civil rights actions today which challenge a prosecutors' immunity as it was over a half a century ago. 424 U.S. at 427-28.

Thus, the principal has long been recognized that suits in which a prosecutor is accused of misconduct in the initiation of a prosecution may not be maintained. See *Bradley v. Fisher*, 80 U.S. 335 (1871); *Cawley v. Warren*, 216 F.2d 74 (7th Cir. 1954); *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950); *Stockheimer v. Underwood*, 428 F. Supp. 192, 195 (W.D. Wis. 1977).

Plaintiffs contend that defendants will initiate prosecutions against Mr. Ostrer and his relatives for malicious reasons; these relatives, it is claimed, are being ransomed for Ostrer's cooperation. The *Imbler* Court focused on a complaint of malicious prosecution as the starting point of its analysis of the law of immunity. The Court stated:

"The function of a prosecutor that most often invites a common-law tort action is his decision to initiate a prosecution, as this may lead to a suit for malicious prosecution. . . ." *Imbler v. Pachtman*, *supra*, 424 U.S. at 421.

Historically, the Supreme Court noted, a prosecutor, regardless of allegations of malice, has been held to be absolutely immune from suits attacking the propriety of the decision to initiate a prosecution. *Id.* at 421-22. The immunity is grounded on public policy and is absolute. It is of no relevance that the prosecution will or will not ultimately result in a conviction. 424 U.S. at 426 n.24. See also *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 377, 380 (2d Cir. 1973). Hence, the defendants Aronwald and Naftalis are absolutely immune from suit.*

It is also interesting to note that dismissal of the action against the very individuals, Fiske and Levi, who conceivably might have been deemed responsible for the alleged six-year harassment on the basis of *Black v. United States*, *supra*, 534 F.2d at 527-28, has not been challenged. It is difficult to understand how plaintiffs can acquiesce in the determination that defendants Fiske and Levi are immune from prosecution for acts of their

* Plaintiffs apparently assume that the grand jury serves no function other than to ministerially vote indictments. This erroneous assumption is the silent argument which necessarily flows throughout their brief. This unspoken premise is simply incorrect. *Costello v. United States*, 350 U.S. 359, 362-63 (1956).

subordinates for which they have no immediate responsibility, while urging that the remaining defendants should be held accountable for the acts of others which they clearly have had no immediate connection with.*

B. Injunctive Relief Was Properly Denied

Plaintiffs contentions with respect to the grand jury and the sufficiency of evidence to indict is obviously mere speculation; and such speculation does not serve to invite the drastic relief which plaintiffs request, *i.e.*, discharge of the grand jury, restraining Naftalis' further presentation of evidence to the grand jury and immunization from prosecution.* Plaintiffs will have an opportunity to raise their arguments regarding the sufficiency of the evidence if indictments are returned. Pre-trial injunctions should not be available where the claims of impropriety can be raised as defenses to the criminal prosecution and an injunction will, in effect, prejudice a

* The absurdity of plaintiffs attempt to impute wrongdoing to the remaining defendants is demonstrated by the concession that Naftalis did not join the Strike Force until early 1976; hence, he could not have possibly been involved in the alleged six year conspiracy. Moreover, in a hearing before Judge Werker on August 2, 1976, concerning the motion for preliminary relief, plaintiffs admitted that Naftalis had no knowledge of the alleged conspiracy before 1976 (August 28, 1976 Hearing Transcript at 5-6); consequently, he could not have participated in it. Therefore, the only alleged act of wrongdoing that could be attributable to Mr. Naftalis is his participation in the discussion which took place on June 11, 1976.

** The Supreme Court has clearly reaffirmed the rule that where the injury is only speculative and not "immediate and real", injunctive relief is not appropriate in civil rights actions challenging the conduct of public officials. *Rizzo v. Goode*, 423 U.S. 362, 375-78 (1976); *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974). These cases involved specific acts of alleged misconduct on the part of public officials, who were not named defendants, without an express nexus between that misconduct and the threatened future actions of the defendants with respect to the plaintiffs.

trial on the merits. See *Gerstein v. Pugh*, 400 U.S. 103, 108 n.9 (1975).

In *Brawer v. Horowitz*, 535 F.2d 830, 834 (3d Cir. 1976), the only post *Imbler* case cited by plaintiffs in their argument for injunctive relief, the court held that *Imbler* immunity *does* extend to action for equitable relief. It is submitted that the District Court's determination to the same effect in the present case should be affirmed.

C. The Allegations In the Fourth Cause Of Action Do Not State a Claim

The essential focus of the allegations of the fourth cause of action is that the defendants are pursuing the present investigation for the sole purpose of coercing Louis C. Ostrer. It is submitted that the statements by defendants during the June 11, 1976 meeting, even accepting plaintiffs' attorneys versions of that meeting in their entirety, do not provide a basis for a cognizable cause of action.

Prosecutors have the discretion to determine what is presented to the grand jury. *Russell v. Parratt*, 543 F.2d 1214, 1216 (8th Cir. 1976); *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967); *United States v. Segelman*, 86 F. Supp. 114 (W.D. Pa. 1949); *Application of Texas Co.*, 27 F. Supp. 847 (E.D. Ill. 1939). Moreover, almost a century ago the United States Supreme Court recognized the discretion of the prosecutor to offer a potential target of an investigation immunity from prosecution in exchange for cooperation in a criminal investigation. *Wiskey Cases*, 99 U.S. 594 (1878). See *United States v. Levy*, 153 F.2d 995 (3d Cir. 1946); *United States v. Weinberg*, 65 F.2d 394 (2d Cir. 1933). In *Newman v. United States*, *supra*, 382 F.2d at 480, the court stated:

"Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought." *Accord, Inmate of Attica Correctional Facility v. Rockefeller, supra*, 477 F.2d at 380.

Indeed, a prosecutor's decision to seek an indictment has been subject to judicial scrutiny only on a *substantial* claim of racial and similar discrimination. *United States v. Strutton*, 494 F.2d 686, 688 (2d Cir. 1974); *see United States v. Smith*, 523 F.2d 771, 782 (5th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3249 (U.S. Oct. 5, 1976); *United States v. Niedelman*, 356 F. Supp. 979, 984 (S.D.N.Y. 1973).

According to plaintiffs' version of the June 11, 1976 meeting, one of two specific statements attributed to the defendants which may suggest impropriety is that the grand jury would probably indict but that a conviction might not follow. While defendants, allegedly, may believe that this will be the ultimate result, neither plaintiffs nor defendants have the authority to vote the indictment or to convict. More important, the grand jury's responsibility is clearly distinguishable from that of the defendants, and anything which defendants may have said concerning the probable outcome of the investigation is mere conjecture. Such conjecture is surely no basis for interference with a grand jury investigation.

In *Blair v. United States*, 250 U.S. 278 (1919), the Supreme Court addressed a similar problem:

"[H]e [a subpoenaed witness] is not entitled to set limits to the investigation that the grand jury may conduct. . . It is a grand jury inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not limited narrowly

by questions of propriety or forecasts of the probable result of the investigation." (Emphasis added.)

In addition to focusing upon "forecasts", the Court in *Blair* also stated that questions of "propriety" of an investigation should not be permitted to narrow the scope of the investigation.

A second act of alleged impropriety is the statement attributed to defendant Sontag that the "IRS has recommended against the indictment of Benjamin Ostrer" (Silverplate Affidavit ¶ 11, a168). To conclude, on the basis of this statement, that the grand jury does not have sufficient evidence to indict requires a great deal of speculation. There is no requirement that an indictment be based on evidence sufficient to establish with certainty that those charged are guilty of the charges. Guilt or innocence must be determined by the court and jury. *United States v. Wortman*, 26 F.R.D. 183 (E.D. Ill. 1960). While plaintiffs may sincerely believe that they would not be the subject of a grand jury investigation but for their relation to Louis Ostrer, plaintiffs fail to provide one fact to support the conclusion that the defendants have been investigating them on the basis of insufficient evidence. Obviously, plaintiffs are not privy to the information which has been or may be presented to the grand jury. Plaintiffs' allegations regarding the probable outcome of the investigation are also based upon unsupported speculation.

It is well established in federal courts that mere speculation is not sufficient to overcome the presumption that grand jury action is proper. *Costello v. United States*, *supra*, 350 U.S. at 363; *United States v. Steel*, 238 F. Supp. 580, 582 (S.D.N.Y. 1965); *United States v. Fujimoto*, 102 F. Supp. 890, 897 (D. Hawaii 1952).

Furthermore, a suggestion that the prosecutors' bias has been imported to the grand jury will not serve to overcome this presumption. *Garin v. United States*, 313 F.2d 641 (1st Cir. 1963); *United States v. Steel, supra*, 238 F. Supp. at 582.

Therefore, even if all of the facts (not unsupported conclusions) alleged in the fourth cause of action are assumed to be accurate plaintiffs have failed to establish a factual basis upon which relief may be granted.

Plaintiffs invite discussion of the issue of delimiting the scope of prosecutorial immunity by citing several cases which have limited that immunity. However, plaintiffs do not demonstrate the applicability of these cases to the instant case, nor could they. Indeed, none of the cases cited by plaintiffs involve the activities of a prosecutor in initiating a prosecution, except in recognizing that absolute immunity applies in that circumstance.

All of the cases cited by plaintiffs, and indeed all of the cases which have addressed the issue of limiting a prosecutor's immunity, have been decided upon the basis of peculiar facts which clearly support the conclusion that the prosecutor acted in an administrative or investigative capacity.

D. Cases Relied Upon by Plaintiff Are Inapposite

Plaintiffs cite *Tomko v. Lees*, 416 F. Supp. 1137 (W.D.Pa 1976) as "most dramatically in support" of their position. In *Tomko*, the plaintiff alleged that he was threatened by the District Attorney, an Assistant District Attorney and a police officer. The nature of the threats, be they physical or otherwise, is not specified. As a result of the threats, plaintiff was compelled on four occasions to act "as a police agent and informant and to testify against persons . . ." from whom he had purchased illegal

drugs. 416 F. Supp. at 1138. This scenario bares no resemblance to the case at bar. No criminal charges were brought against the plaintiff in *Tomko* nor does it appear that he was the subject of an investigation. The Court found that the defendants were acting in a police/investigative role. Here, the allegation of misconduct relates to the prosecutor's role in initiating a prosecution.

Walker v. Cahalan, 542 F.2d 681 (6th Cir. 1976); *Shifrin v. Wilson*, 412 F. Supp. 1282 (D.D.C. 1976); and *Austin v. Manlin*, 433 F. Supp. 648 (E.D.Pa. 1977), involved the activities of prosecutors which were clearly beyond the parameters of their functions as judicial or quasi-judicial officials. These cases involve prosecutors' activities in their administrative or ministerial capacities. They clearly do not involve the activities of a prosecutor in initiating a prosecution, except insofar as they state that absolute immunity attaches where a prosecutor is acting in his quasi-judicial capacity.

In *Scolnick v. Winston*, 219 F. Supp. 836 (S.D.N.Y. 1963), *aff'd sub nom. Scolnick v. Lefkowitz*, 329 F.2d 716 (2d Cir. 1964), the plaintiff was involuntarily committed to a state mental institution. The defendants included the police commissioner, the Attorney General of the State of New York and one of his assistants. The Attorney General and his assistant argued that they were immune from suit because "their actions . . . were taken as officers of the State, and therefore the suit is actually one against the State of New York, which has not consented to be sued here." 219 F. Supp. at 840. The issue was one of sovereign immunity, not prosecutorial immunity. The District Court held that sovereign immunity was not a defense.*

* Eventually, the defendants submitted affidavits and were awarded summary judgment. *Scolnick v. Lefkowitz*, *supra*, 329 F.2d at 717.

The plaintiff in *Scolnick* also claimed that the defendants should have investigated certain charges brought to their attention by the plaintiff. In this connection, the District Court found that the defendants were immune from suit as quasi-judicial officers. 219 F. Supp. at 841. This Court affirmed that decision. To the extent this case is relevant, it supports the defendants' right to immunity.

In *Helstoski v. Goldstein*, Dkt. No. 76-1956 (3d Cir., Feb. 22, 1977), the Third Circuit held that "the several allegations of deliberate leaks by the prosecutor of false information concerning Mr. Helstoski in order to damage his political prospects" constituted conduct beyond the "rationale for absolute immunity set forth in *Imbler*." Slip op. at 4. There is no suggestion in *Helstoski* that the "deliberate leaks" of "false information" related to the initiation of a prosecution. In this case, all of the allegations in the fourth cause of action are associated with the initiation of prosecution.*

Briggs v. Goodwin, Dkt. No. 75-1642 (D.C. Cir., Sept. 21, 1977), is the latest in the line of cases which has departed from the *Imbler* doctrine. See Note, *Delimiting the Scope of Prosecutorial Immunity From Section 1983 Damage Suits*, 52 N.Y.U.L. Rev. 173 (1977). In a rather strained opinion, Judge McGowan states that a prosecutor who allegedly testified falsely before a federal district court in Florida while representing the United States Department of Justice in a proceeding before that court was not entitled to either the absolute immunity of a prosecutor or witness. The Court found that the prosecutor's function in Florida was principally to determine if viola-

* It should be noted that the third cause of action does contain a conclusory allegation that Mr. Ostrer has been labelled as "connected with organized crime and labor racketeering". Complaint ¶ 25)a 12. As set forth in Point I *supra*, the allegation does not state a claim. *Black v. United States*, *supra*. In *Helstoski*, moreover, there was no challenge to the sufficiency of the allegation of the complaint, nor was there any question raised with respect to the nexus of the defendants and the alleged "leaks."

tions of federal law had occurred. Moreover, the Court found that the false testimony of defendant was intended to protect an investigative source; namely, an informant in the midst of plaintiffs. Hence, the Court concluded that the acts of the defendant should be characterized as investigative. The Court went on to state that the grand jury, for which the prosecutor defendant was responsible, was functioning as an investigative tool rather than acting "in its more familiar guise as a deliberative body deciding whether to return indictments for specific crimes on the basis of evidence gathered and presented by a public prosecutor." *Id.* at 26. The Court held:

"... [A]bsolute immunity under *Imbler* extends only as far as necessary to protect a prosecutor's decision with respect to the initiation and conduct of particular cases." Slip op. at 17."

The prosecutor's conduct in *Imbler* was necessarily found to be unrelated to the initiation and conduct of a particular case. While we believe that the *Briggs* analysis of *Imbler* is incorrect, it is also irrelevant to the case at bar. Here, the defendants' conduct is only related to the initiation and conduct of particular cases.*

* In a well reasoned dissent, Judge Wilkey very clearly points out the majority's faulty analysis of the role of the grand jury stating that the grand jury always has both roles of hearing evidence and deciding whether to indict. *Id.* at 30-36. Judge Wilkey stated:

"... it would surely seem on its face that Goodwin's action during grand jury proceedings in answering a question from the judge in his capacity as lead prosecutor was action taken as an officer of the court. This was action within his scope of duty which called for the exercise of discretion in its performance, precisely the type of "quasi-judicial" function within the absolute protection of *Imbler*." *Id.* at 14.

The *Briggs* decision, while enlightening on the fundamental principles underlying a prosecutor's role as advocate versus his role as investigator, is clearly distinguishable, on its facts, from the case at bar.

POINT III

Killeen And Sontag Established A Good Faith Defense.

The defendants' motion to dismiss the complaint was predicated upon Rule 12(b)(6) of the Federal Rules of Civil Procedure which provides that the defense that a complaint fails to state a cause of action may be presented by motion, and that where on such motion matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and shall be disposed of as provided in Rule 56. It was not important whether the motion which brought about the present dismissal, considered together with matters outside the pleadings, was denominated either one for dismissal of the action for failure to state a claim or one for summary judgment. *Exchange National Bank of Chicago v. Touche Ross & Co.*, 544 F.2d 1126 (2d Cir. 1976); *Ryan v. Scoggin*, 245 F.2d 54 (10th Cir. 1957); see *Central Mexico Light & Power Co. v. Munch*, 116 F.2d 85 (2d Cir. 1940). The District Court apparently considered all of the affidavits submitted by the parties as well as the record and decision in the proceedings for preliminary relief. Therefore, the determination may be treated as one for summary judgment under the Federal Rules. It was in this context that Killeen and Sontag's good faith defense was evaluated. See *Friedman v. Beame*, Dkt. No. 77-7095, slip op. 4845, 4854 n.11 (2d Cir., July 21, 1977).

Plaintiffs failed to set forth a single fact, either in the pleadings or in their affidavits, which remotely suggests wrongdoing on the part of either Sontag or Killeen.*

* The thrust of plaintiffs' claim in the fourth cause of action is that they may be maliciously prosecuted. Surely, plaintiffs do not claim that Sontag and Killeen have authority to prosecute. See, e.g., *Adams v. Home Owners' Loan Corp.*, 107 F.2d 139 (8th Cir. 1939).

These defendants submitted sworn affidavits stating that they acted in line of their official duties and in good faith, with reasonable belief that all actions they took were entirely lawful.

Plaintiffs did not refute these claims either by affidavit or in their pleadings. Indeed in their brief before this Court they adopted much the same practice which is attendant to their complaint. Specifically, without a single reference, they state that "the allegations against defendants are riddled with claims that defendants [Killeen and Sontag] have acted in bad faith, are guilty of unethical conduct, and have in fact, embarked upon a course of conduct which violates the criminal laws of the State of New York" (Appellants' Brief at 33). They go on to state, "the defendants self-serving statements that they have acted in good faith hardly stand unopposed on the record of this case" (Appellants' Brief at 33). In contrast to these bold assertions is the record in this case. The record is *completely* barren of any mention of wrongdoing on the part of Killeen or Sontag. Moreover, while the conclusory allegations of Count Three could apply to anyone, the enumerated misconduct, *i.e.*, leaks, warnings, subpoenaing and threats to indict are not, on their face, readily associated with defendants Killeen and Sontag. Moreover, the failure of plaintiff Ostrer to mention Killeen and Sontag in his affidavit in support of preliminary relief should suffice to lay this issue to rest.

Thus, contrary to plaintiffs' labored arguments, the affidavits of Killeen and Sontag are sufficient to establish the good faith defense envisioned in *Economou v. U.S. Department of Agriculture*, 535 F.2d 688, 696 (2d Cir. 1976), *cert. granted*, 45 U.S.L.W. 3554 (U.S. Feb. 22, 1977).

In *Barr v. Matteo*, 360 U.S. 564, 571 (1959), the Supreme Court stated:

"The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit fearless vigorous, and effective administration of policies of government."

The Supreme Court concluded:

"The fact that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable, despite the allegations of malice in the complaint. . . ." *Id.* at 575.

Certainly in an action predicated upon unsupported conclusory allegations, defendants' good faith defense which is unchallenged by plaintiffs is sufficient viewed in the context of the enunciated purpose of *Barr* to satisfy the requirements of a good faith defense.

POINT IV

Plaintiffs' Third And Fourth Causes Of Action Are Premature.

Plaintiffs unsupported conclusion that they will be indicted and their unsupported conclusion that such indictments will be based upon insufficient evidence does not state a cause of action. There are so many imponderable "if's" at this juncture, not the least of which

is whether plaintiffs will be indicted, that plaintiffs' third and fourth cause of action are premature.

In *Centracchio v. Garrity*, 198 F.2d 382, 388 (1st Cir. 1952), a case involving a motion to suppress evidence prior to indictment the Court stated:

"The petition, and petitioner's evidence in support thereof, did not disclose that petitioner had yet suffered any violation of his constitutional rights, either under the Fourth or Fifth Amendment. Whether the use against him at the forthcoming trial of the evidence now sought to be suppressed would be a violation of his constitutional rights under the Fifth Amendment may be regarded as doubtful . . .

"Our conclusion is that the district court should have dismissed the petition as lacking in equity, which of course would have been without prejudice to the right of petitioner, in the event of indictment, to raise at some appropriate stage, whether before trial or during the trial, the question as to the admissibility of the evidence disclosed by him in reliance on the Treasury's announced voluntary disclosure policy." *Id.* at 388 (footnote omitted)

While plaintiffs attempt to distinguish *Centracchio* with an allegation that their rights have already been violated (Appellants' Brief at 43 n.21), the claim is illusory. The alleged misconduct in *Centracchio* is the same as that claimed by plaintiffs in the present case.

Specifically, with respect to the third cause of action, *Martin v. Merola*, *supra*, is dispositive, notwithstanding plaintiffs' vehement assertions to the contrary (Appellants' Brief at 43-44). In *Martin* this Court declined to decide issues similar to those presented here. The case was predicated upon alleged violations of the appellants' Constitutional rights allegedly resulting from news-

paper reports of statements made by The Bronx District Attorney after appellants' arrest. The District Attorney admittedly stated that appellants had strong ties with organized crime families. The district court granted appellees summary judgment motion on the grounds that the statements did not deprive appellants of their rights under the Constitution. This Court dismissed the complaint on the ground that the action was premaure:

"[U]ntil the state prosecutions have been concluded, it is simply impossible to make any reasoned evaluation of plaintiffs' claim that they have been deprived of the opportunity to secure a fair trial by reason of the defendants' actions. Such a claim requires more than the mere speculation of damages contained in plaintiffs' complaint: it requires a showing that plaintiffs have in fact been denied their due process rights. *Rosenberg v. Martin*, 478 F.2d 520, 525 (2d Cir.), *cert. denied*, 414 U.S. 872, 94 S. Ct. 102, 38 L.Ed. 2d 90 (1973). We do not know, nor can the parties now illuminate, whether an impartial jury may be selected. Cf. *Tunnell v. Wiley*, 514 F. 2d 971 (3d Cir. 1975). Similarly, we can only guess as to the desirability of a change in venue or the feasibility of a continuance.

* * *

"Accordingly, we agree that plaintiffs' complaint must be dismissed on the basis that it is now premature. We do so without prejudice to its renewal at the conclusion of state criminal proceedings when the district court will be better able to assess the merits of plaintiffs' claim." 532 F.2d at 194-95.

The grand jury is presumably in the process of evaluating evidence in connection with the plaintiffs' possible criminal activity. Obviously, additional evi-

dence may be presented from various sources. The probable existence of a crime, and the identities of those involved can not be conclusively determined until the end of the grand jury proceedings. *In Re Grand Jury Subpoena Duces Tecum Addressed to Provision Salesman*, 203 F. Supp. 575 (S.D.N.Y. 1961). It is, therefore, respectfully submitted that the third and fourth causes of action in the present case are no less premature than the causes of action contained in the *Centracchio* and *Martin* cases and should be dismissed. See *United States v. Wolfson*, 269 F. Supp. 621 (S.D.N.Y. 1967). Cf. *Regan v. Sullivan*, Dkt. No. 76-6139, slip op. 3777, 3781 (2d Cir., May 25, 1977).

CONCLUSION

The judgment of the District Court dismissing the complaint should, in all respects, be affirmed.

Dated: New York, New York
November 4, 1977

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York) ss
County of New York)

Gary G. Cooper being duly sworn,
deposes and says that he is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
two copies
7th day of November 1977 he served a ~~copy~~ of the
within Appellee's Brief

by placing the same in a properly postpaid franked envelope addressed:

Alan M. Dershowitz
Faculty Office Building
Harvard Law School
Cambridge, MA 02138

And deponent further says he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Harry G. Cooper

Sworn to before me this

7th day of November, 19 77

PAULINE P. TROLA
Notary Public, State of New York
No. 31-4632381
Qualified in New York County
Commission Expires March 30, 1978

